

## **Exhibit A**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Arthur Lee Alfred, II and Ezequiel Martinez,  
Jr.,

Plaintiffs,

v.

Walt Disney Pictures,

Defendant.

Case No. 2:18-CV-08074-CBM-AS

**Expert Report of James McDonald**

**March 30, 2021**

## BACKGROUND AND QUALIFICATIONS

I am a Story Analyst and consultant on screenwriting and writer-credit issues for motion pictures. I have a Bachelor of Arts in Communications from Stanford University and an M.F.A. in Directing for Film & TV from the UCLA Film School.

Over the last four decades, I have worked for every major studio and several other studios and production companies. In that time, I have read and analyzed more than 10,000 submissions for feature film development. I spent two years as vice president in charge of development for an independent production company. As a producer, with partners, I put three feature film projects into development at studios and production companies.

Over the last three decades, I have reviewed and analyzed the development process of more than 90 films and TV series and made recommendations as to writing credits.

My current curriculum vitae is attached to the end of this report.

Within the last five years, I have testified as an expert at one arbitration, the 2016 arbitration case *The Writers Guild of America West, Inc. vs. Touchstone Television Pictures, LLC, ABC Studios and Film 49 Productions, Inc.*, No. 15-CR-0040.

I have prepared and delivered this report in connection with the case *Arthur Lee Alfred, II, et al. v. The Walt Disney Company et al.*, No. CV 18-8074-CBM-ASx, currently pending in the United States District Court for the Central District of California. I have been retained by defense counsel to analyze and testify about the similarities and differences between the Plaintiffs' screenplay *Pirates of the Caribbean* ("Plaintiffs' Screenplay") and the Defendant's feature film *Pirates of the Caribbean: The Curse of the Black Pearl* ("Disney Film" or "Curse of the Black Pearl"). I am being compensated for my time spent conducting this analysis at the rate of \$200 per hour. In the event that I testify, I will be compensated for my time at the rate of \$400 per hour.

## ASSIGNMENT AND APPLICABLE STANDARDS

At defense counsel's request, I have analyzed Plaintiffs' Screenplay and the Disney Film under what I understand to be the standards applicable to the "extrinsic test" for substantial similarity under applicable copyright laws. I have been asked to assume that the extrinsic test requires a comparison of the two works' setting, plot, characters, theme, mood, pace, dialogue, and sequence of events. Further, I understand that I should "filter" out certain unprotectable elements that fall on the "idea" side of the "idea-expression" dichotomy. Within the framework of the filtration standards I have been asked to assume and apply, I have brought to bear my knowledge and experience with respect to the creation and development of stories into motion pictures.

My analysis in this report assumes that the following principles guide the filtration analysis.

I understand that filtration is the process of identifying and discarding unprotectable elements before comparing two works to determine their substantial similarity. As explained to

me, I understand that U.S. Supreme Court Judge Learned Hand described a test of “abstractions” to draw the line between protectable and non-protectable elements. I am informed that Judge Hand described this test as follows: “Upon any work and especially upon a play a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about and at times consist of only its title, but there is a point in this series of abstractions where they are no longer protected since otherwise the playwright could prevent the use of his ideas to which apart from their expression his property is never extended.”

I have assumed that, at the extrinsic stage of analysis, unprotectable elements must be filtered out before a court compares the two works. I understand that these unprotectable elements include ideas, expression merged with ideas, *scenes a faire* (or stock scenes and features), features dictated by functional considerations, as well as features that are not original to the copyright plaintiff.

I understand that *scenes a faire* are defined as stock elements that flow from a basic idea. These stock elements may be patterns, motifs, situations, or scenes that are bound to occur given certain story parameters. I also understand that the merger doctrine is similar, but not identical, to the *scenes a faire* doctrine. I understand that the merger doctrine applies when there is a “merger” of idea and expression, such that a given idea is inseparably tied to a particular expression. I further understand that, where functional considerations in the subject matter or medium selected constrain the author’s creative choices, the constrained elements must be filtered out.

## **MATERIALS AND INFORMATION CONSIDERED**

In conducting my analysis, I have reviewed and considered the following materials:

- Plaintiffs’ screenplay *Pirates of the Caribbean*;
- Disney’s motion picture *Pirates of the Caribbean: The Curse of the Black Pearl*;
- the Expert Report of David Román attached as Exhibit 6 to Plaintiffs’ First Amended Complaint (“Román Expert Report”);
- the Court’s “Order Re: Defendants’ Motion to Dismiss Plaintiffs’ Complaint,” dated May 13, 2019;
- Plaintiffs’ original “Complaint & Jury Demand,” including attachments, dated November 14, 2017;
- Plaintiffs’ First Amended Complaint, dated November 30, 2020, including the “sizzle reel” included as an exhibit;
- footage of the Disneyland theme park ride “Pirates of the Caribbean” (the “Disneyland Ride”); and
- relevant works in the pirate genre, such as works cited in paragraph 8 of Plaintiffs’ original Complaint: *A General History of the Pyrates*, *Robinson Crusoe*, *Treasure Island*, *Peter Pan*, *Captain Singleton*, *The Pirate*, *The Gold-Bug*, *The Coral Island*, and *The Red Rover*, and films cited in paragraph 10 of Plaintiffs’ original complaint: *Treasure Island*,

*Peter Pan, Savage Island, The Buccaneer, The Pirate, The Island, Captain Blood, Blackbeard the Pirate, and Yellowbeard.* (Some of these works have appeared in multiple media, e.g., a novel, a play, a film.) I have also reviewed *The Goonies*, a pirate film referenced in Plaintiffs' pitch materials that were exhibits to Plaintiffs' original and amended complaints, and *Cutthroat Island*, a pirate film at least indirectly referenced in Plaintiffs' pitch materials.

## **SUMMARY OF AFFIRMATIVE AND REBUTTAL OPINIONS**

Based on the materials I have reviewed and the analysis that I describe below, I conclude that, especially after filtering out the unprotectable elements of Plaintiffs' Screenplay, there is no substantial similarity between Plaintiffs' Screenplay and the Disney Film at the level of expressive content. This conclusion holds along all of the pertinent dimensions of plot, characters, themes, mood, setting, pace, dialogue, and sequence of events.

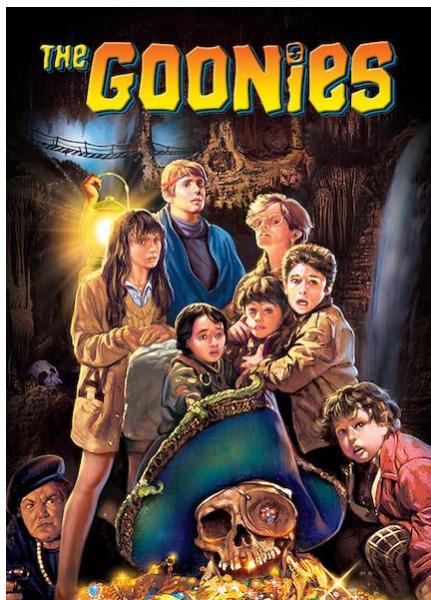
I understand that David Román, the Plaintiffs' expert, has stated that his contentions regarding the protectable similarities of expression may be found in his expert report. I therefore have reviewed his report to consider whether the points he raises change my analysis. They do not. In fact, I believe Dr. Román's report reflects a lack of familiarity with the pirate genre in general and of the specific works Plaintiffs state are characteristic of the genre. The similarities and novelties that Dr. Román identifies either do not exist, are common to other pirate films and literature, or exist at such a high level of abstraction that they constitute unprotectable "ideas" instead of the protectable "expression" of those ideas.

## **SIMILARITY ANALYSIS**

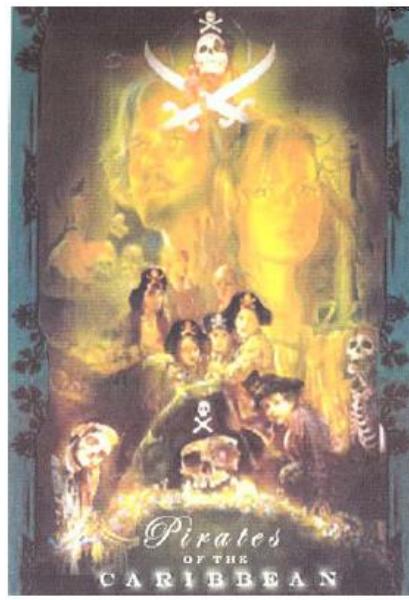
### **I. Plaintiffs' Screenplay Is a Generic Combination of Two Well-Known works, *The Goonies* and *Cutthroat Island***

Plaintiffs' Screenplay is about two pirates fighting over the pieces of a map to a lost treasure with the hero winning the battle and ending up with his real treasure, love and family. As Plaintiffs' cover letter describes, at its base, their Screenplay is "'Goonies' meets 'Pirates of the Caribbean.'" (First Amended Complaint, Exhibit 2.) In my opinion, that is in essence all Plaintiffs' Screenplay is.

*The Goonies*



Plaintiffs' Concept Art



*Cutthroat Island*



Plaintiffs' concept art (above, center), submitted with their pitch materials, further confirms that their Screenplay is merely a pastiche of existing ideas. Plaintiffs prepared and submitted a mock-up poster that literally overlays posters from two well-known pirate-related films—*The Goonies* (above, left) and *Cutthroat Island* (above, right)—adding a few minor elements taken from Disney's Pirates of the Caribbean amusement park attraction. At the center of the concept art is a group of children, huddled together in front of their parents and over a skull atop a pile of treasure—borrowed entirely from *The Goonies* movie poster. And nearer to the top, almost in the background, is the faded center image of the movie poster for *Cutthroat Island*, a film Plaintiffs relied on in creating the concept for their Screenplay.

*The Goonies*, released in 1985, is an iconic film about a group of young misfits who discover a treasure map that takes them on an adventure to find the long-lost treasure of a 17th-century pirate, One-Eyed Willy. In the end, the characters come together and discover the real treasure is love and family.

*Cutthroat Island*, released in 1995, is a pirate film about a female pirate and her con-man companion finding three pieces of a map in a quest to find a hidden island full of treasure (the eponymous “Cutthroat Island”). In the process, the female pirate and her companion find both moral redemption and love in one another.

Plaintiffs' Screenplay is a generic and uninventive combination of these two well-known works.

## II. Plaintiffs' Screenplay and the Disney Film Are Fundamentally Dissimilar in All Respects Relevant to the Extrinsic Test

Though both works under analysis are about pirates in the Caribbean, they tell two different stories with substantially different plots, characters, and relationship dynamics. Plaintiffs' Screenplay is about two pirates fighting over the pieces of a map to an immense

wealth of treasure, with the hero teaming up with a band of child misfits, winning the battle, and ending up with his real treasure, love and family. In the end, the pirate-hero abandons piracy for a respectable family life. Disney's *Curse of the Black Pearl* is about two adult heroes teaming up to rescue the governor's daughter and retake the first hero's ship from cursed, undead pirates intent on lifting the curse. In the end, the curse is lifted; the formerly cursed pirates die or are captured; the pirate-hero gets his ship back *and resumes a life of piracy*; and the non-pirate hero wins the governor's daughter, whom he has long adored.

While both works fall within the pirate genre (and thus feature characteristic scenes from that genre) and both draw upon the Disneyland Ride, they are substantially different. Plaintiffs' Screenplay is a pastiche of *The Goonies*, *Cutthroat Island*, and the Disneyland Ride—heavy on slapstick humor, focusing largely on a group of misfit kids, and ultimately about giving up piracy and treasure-hunting for family life. *Curse of the Black Pearl* is a clever, supernatural story about undead pirates who must break their curse and thus find life (and death) by recovering the last piece of a treasure they stole long ago. The Disney Film's protagonists are drawn *to* piracy, not away from it, and they are all adults. It is not a redemption story but a liberation story. While both works have humor, the humor in Plaintiffs' Screenplay is conventional slapstick humor imitative of *The Goonies*. The Disney Film has more sophisticated humor, embodied in the wry and ludicrous Jack Sparrow, a character unlike anyone in Plaintiffs' Screenplay. As explained more thoroughly below, similarities can be found between the works because they both fall in the pirate genre; but they are not substantially similar, especially once generic elements are filtered out.

I believe that the fundamental differences in the two works are reflected in each of the characteristics relevant to the extrinsic test.

#### A. Plot

If "story" is defined as what a narrative is about, then "plot" is how the elements and dynamics of the story are told—i.e., its narrative structure or story line.

Even though Plaintiffs' Screenplay and the Disney Film's stories are about pirates, the plot differences between the two works are substantial, while the similarities are superficial to the point that the works only share abstract and/or generic ideas. To clearly spell out their similarities and differences, one can apply the paradigmatic three-act plot structure and framework formula.<sup>1</sup> This structure consists of an "inciting incident," which sets up a "conflict" (act one), which is then "complicated" (act two) as it builds to a "climax," which ends with a "resolution" (act three).

##### 1. *Inciting Incident.*

Both plots start at sea with ships, but the ships, the characters and the action are different. Plaintiffs' plot starts with a full-on battle between a pirate ship and a British privateer ship<sup>2</sup>—

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<sup>1</sup> On the three-act structure, see Syd Field, *Screenplay* (1979).

<sup>2</sup> Privateers, unlike pirates, operated lawfully under the auspices of a government such as the British crown. Sir Francis Drake, for instance, was a privateer.

reminiscent of the opening of *The Black Swan* (1942)—and ends with the privateer captain, Nefarious, betraying and killing his crew then taking command of the pirate ship as part of his deal with the pirate captain, Davey Jones, with whom he shares a treasure map.

*Curse of the Black Pearl*'s plot starts with a British warship, escorting the new Governor and his daughter, Elizabeth Swan, age ten, to Port Royal, coming upon a burning ship and rescuing an unconscious boy, Will Turner, age ten or eleven, floating on debris in the sea. While watching over Will on deck, Elizabeth finds he's wearing a gold Aztec medallion and thinks the boy is a pirate. As she stands and pockets the medallion, she glimpses a ship with black sails disappearing into the ghostly fog covering the calm seas.

## 2. *Conflict.*

Plaintiffs' plot conflict is set up with Nefarious and Davey each holding half a treasure map and not trusting each other. The action in the prologue has Davey giving his half of the map to his lover, Jane; them getting into a confrontation with Nefarious, who grabs Jane and threatens to throw her overboard if Davey doesn't give him his half of the map; Davey hesitating then giving up the map; Nefarious tossing Jane overboard; a sea monster destroying the ship; and Davey escaping with his half of the map into the rough seas.

Disney's plot conflict is set up at the beginning of Act I with the introduction of the second male hero, Captain Jack Sparrow, who wants to get his ship, the *Black Pearl*, back; the cursed *Black Pearl* pirates, led by Captain Barbossa, kidnapping Elizabeth, now age eighteen; and the revelation that the pirates need to return the gold medallion to break their curse.

## 3. *Complication.*

The most logical (and common) way to develop plot complications is to introduce obstacles for the characters to overcome. Plaintiffs' Screenplay's complications have Jane coming back into Davey's depressed, drunken life after ten years, betraying him to Nefarious then changing her mind, and helping him escape; the orphan Rascal Scoundrels having to survive a gauntlet of booby traps in a cave to retrieve Nefarious' half of the treasure map then getting caught by Nefarious; Nefarious holding Jane captive for betraying him; and Davey needing to rescue Jane and the Rascal Scoundrels then beat Nefarious and his pirates to the treasure.

*Curse of the Black Pearl*'s complications have Jack and Will escaping jail, stealing the British Navy Commodore Norrington's fastest ship, gathering their own pirate crew, and chasing down the *Black Pearl*; and Barbossa and his pirates discovering they need Will's blood along with the medallion to break the curse. After Jack, Will, and their crew lose a sea battle with the *Black Pearl*, Will gives himself up to Barbossa in return for Jack and Elizabeth's freedom. Barbossa holds the crew captive and maroons Jack and Elizabeth on an island. Jack and Elizabeth are rescued by the Norrington and his men; and Elizabeth promises to marry Norrington if he goes after the pirates and rescues Will.

## 4. *Climax.*

Though the climaxes of both works take place in and around an island cave filled with treasure and have plenty of swashbuckling action (in the grand pirate movie tradition), why the

characters are there and how the action elements and dynamics play out are significantly different. In Plaintiffs' Screenplay, the major battle action takes place on the pirate ship and involves Davey heroically battling Nefarious and his pirates to free Jane and the Rascal Scoundrels. The battle action that takes place in the treasure cave has Nefarious first attacking Jane then dueling Davey while the pirates pop jewels out of the cave wall, fend off the Rascal Scoundrels, and try to stop the water pouring through the holes they've created in the wall; and the climactic sequence ends with Davey defeating Nefarious by pinning him to the wall with a sword then escaping with Jane and the Rascal Scoundrels in a rowboat as the cave fills with water and a sea monster swallows Nefarious, followed by the entire island sinking into the sea.

*Curse of the Black Pearl*'s climactic sequences start with Norrington and his men in rowboats outside the treasure cave entrance waiting to ambush the pirates as they leave. Jack rows into the cave and stops Barbossa from cutting Will's throat over the Aztec treasure chest by telling him that Norrington and his men are outside waiting for them. As he palms a medallion from the chest, Jack talks Barbossa into waiting to lift the curse until after they've defeated Norrington and taken his flagship. Jack then offers a deal where he gets the *Black Pearl* and will sail under Barbossa's flagship colors. While Barbossa's cursed pirates walk across the bottom of the sea and ambush the crew of the flagship, Elizabeth slips away in a rowboat to the *Black Pearl* and frees Jack's captive pirate crew, but can't get them to help her rescue Will. While the crew sail off in the *Black Pearl*, Norrington and his men get back to the ship and battle the cursed pirates, and Jack and Barbossa duel in the treasure cave. As Elizabeth arrives and Will defeats the last remaining pirate in the cave, Jack puts his blood on the medallion and flips it to Will as Barbossa threatens to shoot Elizabeth. Jack shoots Barbossa, who is then surprised to see Will lifting the curse by dropping both medallions with Jack's and his blood into the chest. Back on the ship, the cursed pirates find they are mortal again and surrender.

#### 5. *Resolution.*

Plaintiffs' Screenplay ends with the protagonists quitting piracy. Davey, Jane, and the Rascal Scoundrels are rescued by a British privateer ship. Davey and the Rascal Scoundrels leave piracy behind forever to be commissioned as privateers, and are given a ship as reward for ridding the Caribbean of Nefarious. They all sail off with Jane—an ersatz nuclear family—for their next adventure.

*Curse of the Black Pearl* ends with the protagonist *returning* to piracy. At the end of the Disney Film, Jack has been sentenced to hang. Will helps Jack escape the noose with a little distraction from Elizabeth, and Will and Jack take out several soldiers before they are captured on the parapet. Elizabeth then sides with Will and Jack, and the Governor orders his soldiers to lower their weapons. Jack sees a parrot and escapes backwards over the wall into the sea, knowing his *Black Pearl* crew has come for him. The Governor and Commodore accept Elizabeth's choice of life with Will. Significantly, Jack ends the film as a pirate captain of a pirate ship—not a privateer—whistling the Ride's iconic “a pirate's life for me” song.

#### 6. *Plaintiffs' Alleged Plot Similarities in the Complaint and Expert Report*

I noted that paragraphs 104 through 109 in the First Amended Complaint describe three alleged plot similarities between the two works. None of the ideas reflected in the purported plot

similarities are novel. And, when one compares the specific expression of the plot elements in the context of their respective scenes, they are substantially different.

In paragraphs 105 and 106, Plaintiffs argue that the scenes in their Screenplay and the Disney Film of pirates heckling women as they are brought aboard are both unique and similar. Pirates heckling women, however, should be filtered out as generic. In fact, at that level of generality, the idea was already expressed in the Disneyland Ride, which depicted pirates having captured women or pursuing women. The idea of pirates threatening women with violence is expressed differently in the two works:

- In Plaintiff's Screenplay, Jane kicks Pirate #1 in the groin, which prompts his attack; and then, after Nefarious snaps a whip around Pirate #1's neck and orders him keel-hauled, Jane lunges at Nefarious with her dagger but has to stop when she feels Stitch's pistol in her side and his knife at her throat.
- In the Disney Film, Elizabeth is simply slapped by a pirate, whose arm is then grabbed by Barbossa.

To the extent the similarity Plaintiffs are drawing is a pirate captain restraining mistreatment of a female prisoner by pirates, such scenes are routine in the genre, included in works referenced by Plaintiffs, such as *Captain Blood* (1922 novel; 1935 film).

In paragraph 107, Plaintiffs allege that both works depict male pirates disguising themselves as women to deceive enemies during battle. The basic idea of pirates dressing up as women is a generic plot idea that should be filtered out. (This is explained further below in Section III C of this report.) And again, the specific expression of this idea in each work occur in different circumstances with different characters and different action. In Plaintiffs' Screenplay, Jane dresses Davey up to try and sneak him past Nefarious and his crew in the port town midway through the plot. In *Curse of the Black Pearl*, two minor characters, Pintel and Ragetti, are disguised as women in a rowboat to distract the British soldiers just before the climactic battle.

In paragraph 108, Plaintiffs allege that both works contain similar scenes in which the two protagonists take control of their rival's ships. The idea of taking over a ship is generic to the pirate genre (and indeed to virtually all adventure stories set at sea). The scenes are also strikingly dissimilar:

- In Plaintiffs' Screenplay, the Rascal Scoundrels are on the pirate ship looking for the map when the British privateers attack the port town. Davey escapes Nefarious and his men, and then swims to the pirate ship when he sees the boys there and his own ship blown up.
- In *Curse of the Black Pearl*, Elizabeth sneaks off Norrington's flagship as the climactic battle starts, rows to the *Black Pearl*, and frees Jack's pirate crew. Refusing to go with her to the treasure cave to rescue Will, Jack's pirate crew sails off in the *Black Pearl*. In the end, they return to collect Jack, who has just escaped the hangman's noose.

Dr. Román argues that the “most obvious” similarity between the works is “the fact that both scripts feature pirate ships with skeleton crews.” (Román Expert Report, p. 11.) But he does not mention that skeleton or undead pirates are a generic element in pirate stories, including

in the Disneyland Ride that inspired both works. In fact, Plaintiffs' "sizzle reel" included footage of the Ride's skeleton pirates, and it appears that Plaintiffs' inclusion of pirates with painted skeleton faces was intended to superficially link their Screenplay to the Ride. Pirates who are skeletons, ghosts, or undead also appear in well-known works such as the opera *The Flying Dutchman*, the acclaimed comic *Watchmen*, the novel *On Stranger Tides*, the video game *Monkey Island*, and many pirate movies. (This is explained further below in Section III C of this report.)

Also, Dr. Román's description of the works is inaccurate in key respects. For example, in *Curse of the Black Pearl*, Barbossa and his crew *actually are* undead skeletons. The undead pirates appear to be human (and pass themselves off as such), but when struck by moonlight are revealed as skeletons. Being dead already, they cannot be killed until the curse is lifted. In Plaintiffs' Screenplay, by contrast, there are no *actual* skeleton pirates—there are merely pirates who are "ghostly *looking*" with "their faces *painted* into TRIBAL SKULLS," referred to as "skull-faced pirates." In other words, the pirates in Plaintiffs' Screenplay are ordinary humans decorated as skeletons, not vice-versa, and their appearance does not magically change. (The Rascal Scoundrels find skeletons on Nefarious' ship, but they are ordinary inanimate skeletons, not undead pirates.)

## B. Characters

Along with their physical appearance, age, personality, occupation, and/or social status, characters are defined by their emotional and psychological wants and needs, goals, motivations, beliefs, inner conflicts, talents and shortcomings, and relationships—all of which should change and/or grow through the course of the story.

The few similarities there are between Plaintiffs' Screenplay and the Disney Film's characters and relationships are superficial and generic. None of the characters from Plaintiff's work exist in the Disney Film. And even at the highest level of generality (e.g., "pirate protagonist" or "heroine love interest"), there are characters that do not have a conceivable counterpart in each work. For example, the key characters of the Rascal Scoundrels in Plaintiffs' Screenplay (the *Goonies* half of Plaintiffs' pitch to Disney) lack any counterparts in *Curse of the Black Pearl*; and Governor Swan, Will Turner, and Commodore Norrington in *Curse of the Black Pearl* have no counterparts in Plaintiffs' Screenplay. Also, Plaintiffs' Screenplay's pirate crew is significantly different from both of the pirate crews in *Curse of the Black Pearl*—as noted, Plaintiffs' villainous pirates are ordinary pirates motivated by greed who wear makeup to appear scary, while the *Black Pearl*'s crew are cursed, undead skeletons who are motivated by their desire to lift the curse. The crew assembled by Jack and Will in the Disney Film are not villains at all, but protagonists.

### 1. Plaintiffs' Alleged Character Similarities

Plaintiffs draw comparisons between (1) Davy Jones (Plaintiffs' Screenplay) and Captain Jack Sparrow (Disney Film); (2) Jack Nefarious (Plaintiffs' Screenplay) and Hector Barbossa (Disney Film); (3) the Rascal Scoundrels (Plaintiffs' Screenplay) and Jack Sparrow's "crew" (Disney Film); and (4) Jane (Plaintiffs' Screenplay) and Elizabeth Swan (Disney Film). As explained below, these comparisons are superficial and inaccurate.

(a) The Protagonists: Davey Jones v. Captain Jack Sparrow

Plaintiffs' Screenplay's **Davey Jones** is an archetypal pirate hero in the tradition of *Captain Blood* (1922 novel; 1935 film), *The Sea Hawk* (1940), and *Against All Flags* (1952). He is introduced in the Prologue as a cocky "dashing young rogue whose talents in piracy are unsurpassed" then, after losing the love of his life (Jane), becomes a self-pitying, lost drunk until she re-enters his life ten years later. Jane gives Davey Jones the chance to redeem himself by heroically fighting for what he really wants and needs—Jane and the orphans, not gold. He has a conscience and a moral compass. In the end, he renounces piracy and becomes a privateer. The character arc is very similar to that of Captain Blood, a dashing young rogue who becomes a pirate, falls into drink and despair when he believes he has lost his chance at the love of his life, recovers in order to redeem himself in her eyes, becomes a privateer, and wins her love. Plaintiffs acknowledged the influence of *Captain Blood* (1922 novel; 1935 film) in their original complaint.

*Curse of the Black Pearl's* **Jack Sparrow** is a non-traditional hero. He has no morals and not much of a conscience as he schemes and fights to get his ship back. Like Davey—and most pirates—he is drunk a lot. The difference is that Jack drinks for pleasure (a happy drunk) while Davey drinks to forget (a sad, pathetic drunk). Unlike Davey, Jack has no romantic relationship, and isn't seeking one—he makes crude passes at Elizabeth Swan, but does not seek (or win) her love in *Curse of the Black Pearl*. In the end, he is still a pirate, which is what he wants to be. Unlike Davey Jones, he does not become law-abiding, romantically attached, or a father figure to anyone. Jack's arc is not from pirate to family man, but from ousted pirate captain *back to pirate captain*. In short, Jack and Davey's wants, needs and motivations are completely different, as are their relationships with the other characters in their stories.

Plaintiffs' claim that Davey Jones and Jack Sparrow are similar focuses on generic personal characteristics: Plaintiffs allege that both men are "cocky," "dashing," "morally ambiguous," "opportunistic," and fond of rum. (First Amended Complaint, paragraphs 83–84.) These character traits are too generic to be protectable under the applicable rules and should be filtered out. Moreover, they largely merge with the idea of a pirate captain.

Dr. Román also opines that the two characters are similar, but his analysis of them is factually inaccurate. Davey Jones is not introduced as a "disillusioned pirate with a drinking problem." (Román Expert Report, p. 7.) In fact, when he is first introduced in the prologue, he is described as a dashing young rogue, "clean-shaven, hair pinned back in a tail," with "unsurpassed" talents. It isn't until Nefarious betrays him and he loses Jane that he is seen (ten years later) as disillusioned and drunk. Nor is Davey ever depicted as "morally suspect." He is introduced as a classic hero, whose disillusionment is easy to understand and empathize with because he blames himself for losing the love of his life, Jane, in the Prologue. He is clearly the hero, and Plaintiffs' Screenplay encourages the audience to identify with him and root for his redemption.

Jack Sparrow, by contrast, is not young or dashing in an archetypal way (he was portrayed by an actor nearly 40 years of age). His morality isn't merely "questionable"—he clearly has no morals, as he tells Will at the end of their swordfight. Jack drinks because he likes

it; not out of self-pity like Davey. In key respects, he is an anti-hero. Davey and Jack are substantially different in their appearance, attitudes, interests, motivations, and relationships.

(b) The Villains: Captain Jack Nefarious v. Captain Hector Barbossa

Plaintiffs' Screenplay's **Jack Nefarious** is an archetypal pirate villain, much like Dawg Brown in *Cutthroat Island* (1995). Like Dawg's character, he is relentlessly focused on getting a map to lost treasure. He's introduced as a "distinguished naval officer and pirate hunter with a savage instinct and sinister nature" then quickly becomes a ruthless killer, who blows up his privateer crew and ship and takes command of Davey's pirate ship and crew. He has no loyalty to anyone or any moral code, as he readily betrays his partnership in the map with Davey. When he re-enters the story as "Phantom Jack," his "ghostly persona" is clad in the classic baroque style of several real pirate captains of the late 1600s. Like the real Blackbeard, he has fuses in his hair and beard, which he uses against privateers who try to capture him. Though he and his crew have been posing as ghosts, they are not actually dead or cursed.

*Curse of the Black Pearl's* **Hector Barbossa** is defined by two qualities that Jack Nefarious lacks: he is cursed, and he has honor. Barbossa and his crew are cursed to live halfway between life and death, unable to die until the curse is lifted. He can't taste or smell food, and yearns to. In the moonlight, he is revealed to be a skeleton. He and his crew are not motivated by greed, but by a desire to lift the curse and become human again: in an inversion of the classic pirate trope, he and his crew are hunting for treasure not to become wealthy, like a typical pirate (and like Jack Nefarious), but to lift the curse they are under.

Barbossa's second defining characteristic is his honor. He has always been a pirate who lives by the Pirate Code. Unlike Nefarious, his word is his bond when he gives it, and he keeps it. He is loyal to his crew and cooperates with them to lift the curse. Barbossa's relationship with Jack Sparrow is a rivalry over captaining the *Black Pearl*.

Plaintiffs claim that the two villains are "sinister, morally ambiguous and opportunistic." (First Amended Complaint, paragraph 86.) Not only is this stating obvious, generic, functional characteristics of almost any pirate story's antagonist, but the two characters are not actually similar. An examination of Nefarious' actions and dialogue reveals there is nothing "ambiguous" about his morality; he is a vicious pirate with no morals whatsoever. Barbossa, on the other hand, has enough morality to live by the "Pirate Code" and be loyal to his crew.

Plaintiffs also mischaracterize the relationship between Nefarious and Barbossa, whom they claim "were originally Davey Jones'/Jack Sparrow's first mates." (First Amended Complaint, paragraph 86.) That is inaccurate: Barbossa was Jack's first mate, but Nefarious was *not* Davey's—Plaintiffs have flipped the relationship of their characters, as Davey was *Nefarious's* first mate.

Plaintiffs also argue the characters are similar because both "shoot their own crew members to further their own objectives." (First Amended Complaint, paragraph 86.) Pirate captains killing their crew members is a trope as old as the genre (and no doubt true to life, given the brutal means by which authority was maintained in such criminal enterprises). In any case, the specific expressive details of these scenes—i.e., the settings, the context of the scenes, the reason for the shooting, and the outcome—are completely different. In the prologue of

Plaintiffs' Screenplay, Nefarious shoots and kills his privateer first mate to blow up his ship and take over Davey's pirate ship. In *Curse of the Black Pearl*, Barbossa shoots a crewman in the treasure cave to test whether the curse has been lifted, but the crewman doesn't die.

Dr. Román's comparison of the characters also rests on generic character traits—he argues that both characters are cunning, sinister, and charismatic. These traits are too generic to be relevant to the extrinsic test. Dr. Román also claims that, while both villains are “motivated by greed at all costs,” they are “also immensely entertaining and likable,” which he claims “deviates from the treacherous pirate characterization of the standard pirate narrative.” (Román Expert Report, p. 8.) This characterization is confusing as well as highly abstract. Nefarious is not depicted as “immensely entertaining and likable”; Plaintiffs' Screenplay characterizes him as a dark, mysterious, and violent villain.

Even if taken at face value, Dr. Román's description seems to describe many famous pirate villains who are both evil and entertaining, such as Long John Silver in *Treasure Island* (1950) or Captain Hook in *Peter Pan* (1953). It is unclear what is meant by the “standard treacherous pirate characterization,” how these two specifically deviate from it, and how that makes them “less menacing.” In fact, Barbossa is not “motivated by greed at all costs”; his motivation in the Disney Film is not greed but a desire to break the curse at all costs. Nefarious, on the other hand, is “motivated by greed at all costs,” like generic villains in pirate movies where finding a hidden treasure is the main goal that drives the plot action.

(c) Rascal Scoundrels v. Jack Sparrow's Crew

The Rascal Scoundrels are a group of six orphan children, ages seven to fifteen, who, as Plaintiffs describe in their original submission letter to Disney, mirror the ragtag group in *The Goonies* (1985). Each character is specifically introduced to the audience. Jimmy, age fifteen, is the oldest and usual leader of the group. Catfish, age thirteen, wears oversized clothes. Clumsy, age twelve, has a stutter and is, as the name suggests, clumsy. Stink, age eleven, is overweight and constantly eating. Snooze, age ten, again as the name suggests, is always tired. And Littles, age seven, is the youngest of the group. These characters are stock figures in film. While Plaintiffs identified *The Goonies* as the specific source of their copying, it is clear that the Rascal Scoundrels also owe much to the Little Rascals—who went on a pirate adventure seeking treasure in a cave in *Mama's Little Pirates* (1934). Similar ensembles appear in numerous movies such as *The Sandlot* (1993), *The Bad News Bears* (1976), and *Stand By Me* (1986).

The Rascal Scoundrels are nothing more than a generic trope of a group of children dropped into a pirate tale and should be filtered out as generic. Further, despite Plaintiffs' attempt to cast them as “supporting characters,” the Rascal Scoundrels are their Screenplay's *central* characters, with their Screenplay's plot focusing on the Rascal Scoundrels' actions, interactions, and what happens to them in the end. Indeed, the fact that, in their cover letter, Plaintiffs describe their Screenplay as “‘Goonies’ meets ‘Pirates of the Caribbean’” further emphasizes Plaintiffs' concept of the Rascal Scoundrels as their Screenplay's central characters. In *The Goonies* (1985), the main group of children is the center of the story and the namesake of the film.

The Rascal Scoundrels have *no analogue* in *Curse of the Black Pearl*. Jack Sparrow's crew, whom Plaintiffs' complaint compares to the Rascal Scoundrels, actually *are* supporting characters: they have few or no lines of dialogue, they have no character development, and neither the plot arc nor the resolution of *Curse of the Black Pearl* concern them. Showing how implausible this comparison is, Dr. Román abandons it: his expert report compares the Rascal Scoundrels to Will Turner, not to Jack Sparrow's crew. (Román Expert Report, p. 12–13.)

Both claims of similarity are forced at best. The group of orphans in Plaintiffs' Screenplay could not be more different from Sparrow's crew of adult pirates. The Rascal Scoundrels are a group of children, interested in being pirates, who loyally serve as the crew for an adult pirate. Jack Sparrow is a lone wolf for many points in his pirate career, has no one singular crew, associates only with grown men, and has betrayed or been betrayed by many of them. Plaintiffs claim that the two crews share immaturity and violent tendencies, but that does not make them similar. Humor and violence are common in many pirate crews depicted in pirate stories. See above at Section III A. The only concrete comparison Plaintiffs draw between the groups of characters is between Stink in their Screenplay and Gibbs in the Disney Film, on the ground that both are “smelly.” (First Amended Complaint, paragraph 89.) But Gibbs’ sleeping with the pigs is an explicit reference to the Disneyland Ride, and in any event most pirates would likely have had poor hygiene.

(d) Jane v. Elizabeth

Plaintiffs' Jane character, an adult pirate, is a “savvy wench” stock heroine, in the tradition of Captain Rouge in *The Golden Hawk* (1952), Captain Anne Providence in *Anne of the Indies* (1951), Prudence ‘Spitfire’ Stevens in *Against All Flags* (1952), and Morgan Adams in *Cutthroat Island* (1995), the latter of whom Plaintiffs explicitly incorporated into their concept art as the model for Jane. She is out for herself in the beginning and throughout much of the story. When she first appears in the Prologue, she is dressed as a pirate and indicates she and Davey have had a long history together. They’re like a married couple in conflict trying to sort out their relationship. When she reappears, she is hustling and pickpocketing pirates in a bar and working with Nefarious against Davey. She then saves him from Nefarious when Davey tells her he still loves her. In the end, she too realizes love and family are more important than gold.

The Disney Film’s Elizabeth Swan is a fundamentally different character type: she is an archetypal “kidnapped aristocratic heroine” and love interest found in many pirate works—often, as with Elizabeth, the daughter or niece of an island governor. Like Will, her character arc is a “coming of age” journey—from being a sheltered, unsure-of-herself girl confined by the conventions of her station (literally stifled by a corset) to a self-confident woman willing to stand up for herself and choose her own life and love. She and Will are archetypal “young lovers.” Other than being a female captive of the villain, she has nothing in common with Jane.

Plaintiffs' and Dr. Román's abstract comparisons lack specific expressive detail within the context of each story line—e.g., Dr. Román opines, “[b]oth female leads also help rescue their love interest from the trappings set by the rival ship captains.” (Román Expert Report, p. 11.) Aside from being a vague statement without detailed support, female leads helping rescue their love interest is a common genre trope. Also, several of their statements are inaccurate. For example, Dr. Román claims that “[n]either Jane nor Elizabeth is the standard ‘Damsel in

Distress' in need of rescue." (Román Expert Report, p. 10). But early in the Disney Film the Elizabeth character is a classic "damsel in distress" in need of rescue, before the film complicates that trope later. Plaintiffs' Jane character, by contrast, is *never* portrayed as a damsel in distress and isn't taken hostage by Nefarious and his crew until more than halfway through Plaintiffs' Screenplay.

There are other inaccuracies in Dr. Román's comparisons of Elizabeth and Jane. First, Dr. Román opines that the two women "share the same physical characteristics, age, and temperament and function." (Román Expert Report, p. 10.) In Plaintiffs' Screenplay Prologue, Jane is introduced as a full-grown, red-haired woman in "buccaneer clothes," probably at least twenty or twenty-one, who has had a romantic and working pirate relationship with Davey for some time. Ten years later, Jane is a tavern wench hustling drunken pirates for money and in cahoots with Nefarious to get Davey's map. When the Disney Film's Elizabeth character is introduced on a British warship in the film's prologue, she is a child around ten, and the Governor's daughter. Eight years later, she is a proper, aristocratic, brown-haired young lady, attired in a corset and fancy dress, living in the Port Royal Governor's mansion and about to be proposed to by a Commodore in the British Navy. Among many other differences, the women don't share the same age, physical characteristics, or social rank and status.

Second, Dr. Román opines that "the women are thrown overboard and into the sea by the main villain pirate while the male romantic lead begs him to 'let her go!'" This idea is both generic and inaccurate. In the Plaintiffs' Screenplay's prologue, Nefarious throws Jane overboard in response to Davey (their Screenplay's male romantic lead) begging him to "let her go." In *Curse of the Black Pearl*, however, Barbossa and his pirates make Elizabeth walk the plank after they discover she's not the daughter of Bootstrap Bill Turner and of no use to them. Jack Sparrow, who is *not* "the male romantic lead" in the Disney Film, goes overboard after her, and the two of them are marooned on an island. Elizabeth's romantic interest, Will Turner, isn't even on the pirate ship when she walks the plank. So, considering the action in the context of each story line, both women go overboard in different ways, for different reasons, and at different places in the story.

Third, Dr. Román offers that both Jane and Elizabeth "engage the pirates on nearly equal terms in matters of skill, wit, and athletics." (Román Expert Report, p. 10.) This opinion appears to be little more than the claim that both works feature strong female protagonists, which is obviously a generic idea. Again, the expression is utterly different: Jane is a savvy pirate, living by her wits by hustling and pickpocketing other pirates. Elizabeth is the Governor's sheltered daughter trying to survive her kidnapping by pirates.

### C. Themes

The definition of "theme" in art and literature is "a unifying motif" or "recurrent or central idea" that resonates through the development of the characters and plot from beginning to end. It is what the story is about on a philosophical, emotional or psychological level—e.g., Coming of Age, Courage and Perseverance, Revenge, Redemption, Friendship, Family and Love. Themes can be "the moral of the story." Often themes are presented as a dichotomy—e.g., good vs. evil, love vs. hate, rich vs. poor and appearance vs. reality—and used as a filter in developing the arcs of the characters and relationships. Stories often have multiple themes, but

there is typically a major theme that is the most significant theme of the story, and the overriding drive of the whole story—e.g., loyalty to family is the major theme of *The Godfather* book and films; and, true love means being selfless enough to sacrifice one’s happiness, or even life, for another is a common theme of works like *Casablanca* (1942), *A Tale of Two Cities* (1935), and *Titanic* (1997), among many others.

The major theme of Plaintiffs’ Screenplay’s story is that “life’s real treasure is love and family, not gold and jewels.” The thematic conflict set up in the Prologue is “treasure vs. love”—Davey has to choose between giving Nefarious his half of the map to save Jane. It is repeated midway through the plot when Jane betrays Davey to Nefarious then has a change of heart, and then in the end, when Davey and Jane choose saving each other and the orphans over the treasure. There is also a “redemption” theme in Davey’s character arc.

As previously stated, *Curse of the Black Pearl* is a liberation story, “freedom vs. captivity.” Historically, liberation (e.g. freedom from oppression, poverty, slavery, indentured servitude, captivity, etc.) was often what drove people into piracy, which was one of the few “democratic” societies of the time. The thematic dynamic of “liberation” drives each of the main characters to free (liberate) someone or something they love and/or themselves from the social, magical or actual physical restraints or constraints that shackle them:

- Barbossa (and his crew) are driven to liberate themselves from the Aztec curse, which holds them captive between life and death.
- Jack Sparrow is driven by the desire to liberate his beloved ship from the mutinous Barbossa and crew that marooned him on an island. Jack also is constantly fighting and scheming to avoid or escape captivity throughout the Disney Film—from being chased by the Port Royal soldiers, his swordfight with Will, and his imprisonment in the fort jail cells in Act I; through being captured by Barbarossa and marooned a second time then captured by Norrington in Act II; to the hangman’s noose at the end of Act III.
- Will trains with his sword every day as part of his internal drive to liberate himself from the constraints of his social status as an orphan and apprentice to a drunken sword maker. When Elizabeth is kidnapped, Will is driven to rescue (liberate) her from her captors, even to the point of taking her place as Barbossa’s captive.
- Elizabeth’s internal struggle with the restraints and constraints of her social status as the Governor’s daughter is initially illustrated by her battle with a tight-fitting corset as she is being dressed for her meeting with her Father and Norrington. When kidnapped, she argues, negotiates, and battles for her freedom; and then, once freed by Will’s sacrifice, she argues, negotiates, and battles to free him from captivity.
- Will and Elizabeth are also lovers overcoming the obstacles and outside forces thwarting their relationship and the development of their romance. They are brought together by the cursed medallion as kids then separated by it in their late teens, whereupon they choose not to “suffer the slings and arrows of outrageous fortune” but “take up arms against a sea of troubles, and, by opposing, end them.” The romance between lower-class Will and upper-class Elizabeth is a further instance of these characters being liberated from their respective social classes (e.g., working-class apprentice, upper-class marital token).

In the end, the main characters in the Disney Film are all liberated from their social, magical, and physical shackles and free to live the lives they choose: Jack gets his ship back and is free to sail the seas as a pirate; Elizabeth and Will are freed from their social constraints and obligations so they can love and build their life together; and, Barbossa and his crew are freed from the curse.

#### 1. Plaintiffs' Alleged Thematic Similarities

In paragraphs 110 and 111 of the First Amended Complaint, Plaintiffs argue the two works share a common theme of a “pirate ghost story.” Not only does this ignore the generic elements that should be filtered out, as explained above, there are no “undead pirates” in Plaintiffs’ Screenplay; they are only talked about by Davey and the Rascal Scoundrels, and faked by Nefarious and his crew. “Undead pirates” do exist as a central plot element in *Curse of the Black Pearl*; so the specific expression of this “theme” in each work is significantly different. In keeping with the childish tone of Plaintiffs’ Screenplay, the “undead pirates” are more like the masked ghost pirates of *Scooby Doo* than the actual skeletons of the Disney Film.

In paragraph 112, Plaintiffs argue whether the characters are trying to find treasure (their Screenplay) or return it (*Curse of the Black Pearl*) is a distinction without a difference. This is not so. In the Disney Film, the characters are hunting down one medallion to return it to a treasure that is not lost to break the curse they are under, which is distinctly different from fighting over a map to find a “lost treasure.” In any case, there are few plot elements more universal in pirate stories than a hunt for treasure.

As to the theme of “redemption,” which Plaintiffs argue in paragraph 113 is characteristic of both works, it applies to their Screenplay’s story but not the Disney Film’s story. The Merriam-Webster definition of redemption is “the act, process, or an instance of redeeming,” where redeeming is defined as “serving to offset or compensate for a defect.” In Plaintiffs’ Screenplay, Davey spends ten years wallowing in self-pity and self-blame for almost choosing the treasure map over Jane and losing her, then climbs out of the bottle to redeem himself by saving her and the Rascal Scoundrels from Nefarious and his crew. Jack Sparrow in the Disney Film, however, is not a “shell of (his) former self” at the beginning; he’s simply without his ship. He’s the pirate he always was and doesn’t change character through the Disney Film, but he does get his ship back in the end.

Dr. Román’s expert report also includes inaccurate statements: Davey is not “a younger pirate” when he “finds redemption through romance.” (Román Expert Report, p. 12.) Will is not a pirate at the start of *Curse of the Black Pearl*, and never becomes one—the closest is a jest from Elizabeth at the very end. And Will’s romance with Elizabeth has nothing to do with “redemption”: neither Will nor Elizabeth does anything wrong for which they need to be redeemed.

#### D. Setting

Both stories are set in the Caribbean, which, as described above, is the ultimate generic setting for a pirate story and should be filtered out. The same is true for particular scenes, such as a British colonial port town with a governor’s mansion and fort, or a pirate-controlled port. The specific instances of these in the *Curse of the Black Pearl* (Port Royal and Tortuga) appear

in numerous pirate works, including *Captain Blood* (1922 novel; 1935 film). These elements are so generic because they are historically accurate. As described above, deserted islands, sea caves, pirate ships, and the Caribbean Sea are common to both of these stories, and to many pirate stories in movies, literature, and history. Plaintiffs' Screenplay's treasure and the cave settings—including the waterfall entrance—are generic as well, with examples given above. Moreover, these various scenes appear in the Disneyland Ride, and they are acknowledged as such in the scene's action descriptions (e.g., Plaintiffs' Screenplay, p. 91, "The boat continues sailing through the cavern like the *DISNEYLAND RIDE, 'PIRATES OF THE CARIBBEAN'.*").

#### 1. Plaintiffs' Claims.

No specific setting or scenes are described—and no comparative and analytic detail has been made—by Plaintiffs or Dr. Román. Plaintiffs suggest that the ghost ship, port town, and cove with hidden treasure are all similar, but this is not so. First, Nefarious's "ghost ship" isn't a "ghost ship at all." It's just a pirate ship, described as having "a gothic interior (that) would be perfect for Dracula." The Rascal Scoundrels find a lot of skeletons on the ship and a revolving trick bed. Second, Plaintiffs' Screenplay scenes in the port town are: an auction of wenches on an outdoor stage (taken directly from the Disneyland Ride); a clothing store where the Rascal Scoundrels try to buy pirate clothes; an alleyway; Davey's docked privateer ship; the tavern where Davey is first reunited with Jane; and Jane's room. None of these specific settings have any similarity to the specific Port Royal settings in *Curse of the Black Pearl*—e.g., the fort, the Governor's mansion, the blacksmith shop, or the jail. Third and finally, as to the cove where the treasure is hidden, Plaintiffs' Screenplay describes a waterfall entrance in the dark, which is nothing like the sea cave entrance in the Disney Film, and is an explicit reference to the Disneyland Ride. In short, when you compare the specific details, even the generic Caribbean-pirate-story settings in both works are expressed very differently.

#### E. Mood

For the most part, the overall tone of Plaintiffs' Screenplay's action and interaction is light-hearted mishmash of juvenile slapstick comedy with the Rascal Scoundrels, romantic melodrama with Davey and Jane, and swashbuckling action. Plaintiffs were candid in their pitch materials that this is simply a synthesis of *The Goonies* (1985), *Cutthroat Island* (1995), and the Disneyland Ride. The overall tone of the Disney Film, on the other hand, artfully weaves together several elements: satirical comedy, with Jack Sparrow's antics and reactions; romantic adventure, with Will's heroics in rescuing Elizabeth; and horror, with Barbossa and his cursed pirate crew. Comedy, adventure, romance, drama, suspense, melodrama, and horror are common tonal elements found in many pirate movies, plays and literature. Comparing Plaintiffs' Screenplay and the Disney Film, the former is less sophisticated and pitched at a younger audience.

#### 1. Plaintiffs' Claims.

Dr. Román opines that the two works evoke similar moods by using slapstick humor, emotions invoked by supernatural presences, and the presence of a black ship. (Expert Report, p. 24–25.) First, as explained further below in Section III A of this report, humor, irony, and wit, along with physical, gag, and situational comedy are generic terms that can be applied to many pirate movies. *Curse of the Black Pearl*'s comedy is more gag comedy than slapstick (e.g.,

Pintell's eye keeps popping out). Second, as to the "eerie mood" evoked when the "true nature of the supernatural pirates" is revealed, that may refer to particular *moments* in each work but says little about how the moods of the two works compare overall. Also, the "true nature" of Plaintiffs' Screenplay's pirates is that they are live humans made up to look like ghosts, while the "true nature" of the cursed pirates in *Curse of the Black Pearl* is that they're somewhere between life and death and cannot die. Third, and as explained below, a black ship with black sails and a pirate flag sailing out of the fog is a common pirate film trope. And that description of a pirate ship is generic. Indeed, it is a featured element of the acclaimed song "Pirate Jenny" in Berthold Brecht's *Threepenny Opera* (1928): "And the ship / The Black Freighter / Runs a skull up its masthead / And a cheer rings the air / By noontime the dock / Is a-swarmin' with men / Comin' out of the ghostly freighter / They're moving in the shadows / Where no one can see / And they're chainin' up people / And they're bring' em to me." The fact that a pirate ship creates a "sinister and foreboding mood" is its very functional intent—considering that pirate ships literally fly a flag with a skull and crossbones on it.

#### **F. Pace and Sequence of Events**

If pace is defined as how dynamically the plot moves forward, then the pace of Plaintiffs' Screenplay is actually quite slow or, at best inconsistent. Most of the set pieces (sequence of events) in the first half of the story—e.g., from the Prologue to the port town scenes to the Rascal Scoundrels on Nefarious ship—are over-written and don't move the plot forward very fast. For example, the Prologue is 11 pages long, with the initial battle action taking up the first page and the sea monster attack taking up the last page-and-a-half; the eight-and-a-half pages in between are exposition-heavy in introducing Nefarious, Davey, Jane, and their relationships. If you use a page a minute as a rule of thumb, the Prologue takes at least 12 minutes. Immediately following this, pages 12 to 30 are spent with the Rascal Scoundrels somewhat aimlessly running around town before the arrival of Nefarious and his pirate crew in the port and before Davey and Jane are reunited. Nefarious doesn't appear until page 47, then confronts Davey about the map on page 52 and takes Jane hostage on page 54. By this point, we're halfway through the script and the plot hasn't moved very far from where it started, with Nefarious confronting Davey and demanding his half of the map.

In comparison, the Disney Film's Prologue takes 4 minutes and 52 seconds. In the next 35 minutes, Jack Sparrow is introduced; he tries to steal a ship; he rescues Elizabeth from drowning; he escapes his initial capture; he duels with Will, is captured and jailed; and the cursed pirates attack the port and kidnap Elizabeth. By this point, we're a third of the way through the Disney Film, and all the character, relationship, and plot elements have been set up and are moving forward full steam.

The bottom line is that the neither the pace nor the sequence of events in the two works is similar.

##### **1. Plaintiffs' Claims.**

As to Plaintiffs' claims, once one looks beyond their very general, macro view to the specific expressive details of the "events" summarized, the inaccuracies and the substantial differences of expression become clear.

In paragraph 92 of the First Amended Complaint, and in Dr. Román’s expert report, Plaintiffs claim the prologues in the two works are similar. As explained below, the idea of a story with a prologue is generic and should be filtered out. Nor are the two prologues in fact similar. Each prologue has different characters in different situations, with different actions and results:

- In Plaintiffs’ Screenplay, a full-on battle between a pirate ship and a British privateer ship—reminiscent of the opening of *The Black Swan* (1942)—ends with the privateer captain, Nefarious, betraying and killing his crew then taking command of the pirate ship as part of his deal with the pirate captain, Davey Jones. The plot is set up with Nefarious and Davey each holding half a treasure map and not trusting each other. The action has Davey giving his half of the map to his lover, Jane; them getting into a confrontation with Nefarious, who grabs Jane and threatens to throw her overboard if Davey doesn’t give him his half of the map; Davey hesitating then giving up the map; Nefarious tossing Jane overboard; a sea monster destroying the ship; and Davey escaping with his half of the map into the rough seas.
- In *Curse of the Black Pearl*, a British warship, escorting the new Governor and his daughter, Elizabeth, age ten, to Port Royal, comes upon a burning ship and rescues an unconscious boy, Will, floating on debris in the sea. While watching over Will on deck, Elizabeth finds he’s wearing a gold Aztec medallion and thinks the boy is a pirate. As she stands and pockets the medallion, she glimpses a ship with black sails disappearing into the ghostly fog covering the calm seas.

Other differences abound. In *Curse of the Black Pearl*, the gold medallion is only introduced—not explained—in the prologue. The audience does not learn of its significance or back-story until eight years later (after the prologue) when the pirates aboard the *Black Pearl* attack the city and kidnap Elizabeth. Also, the Disney Film’s lead character—Jack Sparrow—and his “motivation” aren’t introduced or established in the prologue. Hence, neither the Disney Film’s lead character nor the key plot dynamic—i.e., that returning the coin will break the curse—are introduced in the Film’s prologue. In Plaintiffs’ Screenplay, by contrast, the key character, key relationships, and key plot point (that obtaining both halves of the map will lead to the treasure) are all fully established. In short, other than taking place on a ship at sea and the image of another ship burning, the specific expression of story elements and their dynamics in the two prologues—i.e., “the foundation for the plot,” “the motivation for the main characters,” and “conflict on the ship that throws the viewer into the pirate story”—are completely different.

In paragraph 93 of the First Amended Complaint, Plaintiffs describe that the characters are “engaged in a series of battles,” following the prologue, which is highly generic in pirate stories.

In paragraph 94, Plaintiffs argue the introduction of Davey Jones and Jack Sparrow are similar in the two works. This is not remotely true. In Plaintiffs’ Screenplay, Davey is first seen on his pirate ship surrounded by privateers with guns pointed at him after the sea battle, while in *Curse of the Black Pearl* Jack Sparrow is first seen atop the mast of a ship as it slowly sinks sailing into a Port Royal dock. Sparrow’s history with Barbossa is not depicted, only recounted, while Nefarious’ betrayal of Davey plays out in Plaintiffs’ Prologue. Also, Nefarious’ betrayal of Davey isn’t a mutiny since Nefarious is already in command of the pirate ship when it

happens; whereas, Barbossa led a mutiny of the Black Pearl crew to supplant Jack as its captain. All mutinies are a form of betrayal, but not all betrayals are mutinous.

In paragraph 95, Plaintiffs argue the attacks on the port towns are similar. Not so:

- Nefarious and his crew sail into the port town after getting a message from Jane via a peg-leg parrot to find Davey and get his half of the map. The pirates don't attack the town. Nefarious marches them into town; questions pirates in the tavern; and lets Jane lead Davey to him and his men. Three British privateers attack the town and blow up Davey's ship. The pirates attack and take over one of the British ships after Davey escapes and makes off with the pirate ship.
- By contrast, in the Disney Film the *Black Pearl* and her cursed pirate crew have a pitched gun battle with the Port Royal fort guns; land and attack the town and fort; and hunt down and kidnap Elizabeth from the Governor's mansion. Plaintiffs' Davey character escapes Nefarious and his men with Jane's help, for which she is taken prisoner, while Disney's Jack character is in jail throughout the battle and doesn't get out until Will springs him from his cell the next morning, long after the battle.

Other than both being examples of the generic pirate-work scene of an amphibious attack on a port town, the scenes share no similarities.

In paragraph 96, Plaintiffs assert that two island scenes are similar. As an initial matter, islands with skulls or references to the dead are generic and should be filtered out.<sup>3</sup> Scenes on islands are one of the most fundamental *scenes a faire* in the pirate genre. Moreover, in Plaintiffs' Screenplay, the action on Calavera Island has the Rascal Scoundrels following the map they have through a jungle, across a gorge to a cave in the shape of Skull & Crossbones, where they retrieve another treasure map from a skeleton pirate sitting on a throne then have to escape (Indiana Jones-style) from the booby-trapped cave just before it closes. They are immediately captured by Nefarious' pirates and taken to the pirate ship. In the Disney Film, the cursed pirates take Elizabeth to the treasure cave on Isla de Muerta and discover her blood on the Aztec medallion doesn't lift the curse; Will sneaks her and the medallion out of the cave and back to the ship he and Jack stole from Norrington; the cursed pirates find Jack Sparrow while searching for Elizabeth; and Jack makes a deal with Barbossa to keep from being killed.

Plaintiffs allege in paragraph 97 that both works feature a ship battle. But again, naval battles are *scenes a faire* in pirate works—one even appears in the Disneyland Ride. In any case, the two ship-battle scenes are expressed very differently. In Plaintiffs' Screenplay, Nefarious and his pirates retake the pirate ship; find that Davey is not there; and prepare to kill the Rascal Scoundrels as they sail to a cove. Davey appears—looking and sounding like the “dashing and brave” “young rogue” he was ten years ago. While Davey battles Nefarious and his men and rescues Jane, the Rascal Scoundrels escape in a rowboat. The gun and cannon battle between Davey and the pirates leads to the ship blowing up. Nefarious and his men escape to a rowboat,

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<sup>3</sup> To name a few, *Treasure Island* (1883) features “Skeleton Island”; *Cutthroat Island* (1995) has the eponymous “Cutthroat Island”; *Peter Pan* (1953) has “Skull Rock”; and *Curse of Monkey Island* (1997) has “Skull Island.” *The Goonies* (1985) has a skull-shaped cave with a pirate ship in it for its climax.

while it appears Davey and Jane have perished in the blast. The tide takes the Rascal Scoundrels' boat into a thick fog in the cove then over a waterfall into the cavern, reminiscent of the Disneyland Ride. Nefarious and his men follow in their boat.

In *Curse of the Black Pearl*, however, the Black Pearl overtakes the ship with Elizabeth, Will, and Jack's crew. After a pitched battle between the ships and crews, during which Barbossa's monkey retrieves the medallion for him, Will threatens to kill himself if Elizabeth isn't set free and his crew isn't left unharmed. Agreeing to Will's terms, Barbossa maroons Elizabeth and Jack on the same island he marooned Jack before then heads back to Isla Muerta with Will and Jack's crew in chains. Jack and Elizabeth are rescued from the island by Commodore Norrington in his flagship. Elizabeth agrees to marry Norrington if he'll save Will. Jack leads Norrington to Isla de Muerta then slips ashore while Norrington and his men wait in boats outside the treasure cave entrance.

In paragraph 98, Plaintiffs' state the scenes in the caverns are similar. As detailed above under "Plot," in Plaintiffs' Screenplay, the battle action that takes place in treasure cave has Nefarious first attacking Jane then dueling Davey while the pirates pop jewels out of the cave wall, fend off the Rascal Scoundrels, and try to stop the water pouring through the holes they've created in the wall. The climactic sequence ends with Davey defeating Nefarious by pinning him to the wall with a sword then escaping with Jane and the Rascal Scoundrels in a rowboat as the cave fills with water and a sea monster swallows Nefarious, followed by the entire island sinking into the sea. Davey, Jane, and the Rascal Scoundrels are rescued by a British privateer ship. Davey and the Rascal Scoundrels are commissioned as privateers and given a ship as reward for ridding the Caribbean of Nefarious; and they all sail off with Jane for their next adventure.

The Disney Film's climactic sequences start with Norrington and his men in rowboats outside the treasure cave entrance waiting to ambush the pirates as they leave. Jack rows into the cave and stops Barbossa from cutting Will's throat over the Aztec treasure chest by telling him that Norrington and his men are outside waiting for them. As he palms a medallion from the chest, Jack talks Barbossa into waiting to lift the curse until after they've defeated Norrington and taken his flagship. Jack then offers a deal where he gets the Black Pearl and will sail under Barbossa's flagship colors. While Barbossa's cursed pirates walk across the bottom of the sea and ambush the crew of the flagship, Elizabeth slips away in a rowboat to the Black Pearl and frees Jack's captive pirate crew, but can't get them to help her rescue Will. While the crew sail off in the Black Pearl, Norrington and his men get back to the ship and battle the cursed pirates, and Jack and Barbossa duel in the treasure cave. As Elizabeth arrives and Will defeats the last remaining pirate in the cave, Jack puts his blood on the medallion and flips it to Will while Barbossa threatens to shoot Elizabeth. Jack shoots Barbossa, who is then surprised to see Will lifting the curse by dropping both medallions with Jack's and his blood into the chest.

Back on the ship, the cursed pirates find they are mortal again and surrender. Jack is arrested and sentenced to hang. Will helps Jack escape the noose with a little distraction from Elizabeth. Will and Jack take out several soldiers before being captured on the parapet. Elizabeth sides with Will and Jack. The Governor orders the soldiers to lower their weapons. Seeing the parrot, Jack falls back over the wall into the sea, knowing his *Black Pearl* crew has come for him. The Governor and Commodore accept Elizabeth's choice of life with Will, and give Jack a day's head start.

## **G. Dialogue**

I found no lines in the Disney Film identical to lines in Plaintiffs' Screenplay. Though there might be a few lines in Plaintiffs' Screenplay vaguely similar to ones in the Film, they are said in different situations within the context of each story and by or to different characters for different reasons. In some instances, Plaintiffs' Screenplay has taken lines from the Disneyland Ride that are also referenced in the Disney Film.

### **1. Plaintiffs' Claims.**

Plaintiffs lists several lines of dialogue taken out of the specific context of the scenes they are found in and calls them "instances of similarity." The dialogue compared in paragraphs 100 through 103 of the First Amended Complaint may be vaguely similar, but the lines are said in different contextual circumstances by and/or to different people for different reasons. The statements in paragraphs 100, 101, and 102 are nothing more than generic statements about cursed pirates or ships with black sails which, as described above, harken back to the legend of *The Flying Dutchman*. The statements in paragraph 103 about characters being slapped by women are simply, and literally, slapstick humor in pirate films, which are similarly generic. In fact, women taunting pirates was featured in the Disneyland Ride by a scene of a woman chasing a pirate and a scene of a wife shouting at her husband being held over a well, "Don't be chicken!"

Dr. Román's expert report makes no specific references to any dialogue. Instead, he insists that the two works share "multiple original patterns of similarities," which is a vague and abstract conclusion. "Patterns" are not specific detailed expressions of settings, plot, characters, relationships, action, theme, pacing, or sequence of events and demonstrate nothing specifically similar.

## **NOVELTY ANALYSIS**

### **III. None of the Elements Dr. Román Relies Upon are Original to Plaintiffs' Screenplay**

Every element of Plaintiffs' Screenplay identified as inventive or original in the expert report of Dr. Román is borrowed from classic works in the pirate genre, in most instances from works referenced in Plaintiffs' original complaint as establishing the central tropes of the genre.

#### **A. Tone and Mood**

Dr. Román posits that Plaintiffs' introduction of irony and wit to a pirate story was an original contribution of Plaintiffs'. This is incorrect.

While real pirates were fearsome criminals, savage murderers, and brutal robbers, and expressed as such in historical non-fiction and fictional accounts, over the last 300 years, many fictional pirates have been romanticized in literature, poetry, song, plays, and films as tragic figures, romantic heroes, and/or glamorous, witty, rogues. Indeed, comedy in pirate stories dates back to at least Gilbert and Sullivan's 1879 operetta, *The Pirates of Penzance*, which satirized the pirate melodramas of the period.

Humor, irony, and wit are generic terms that can be applied to many pirate movies, especially in the films of the last 100 years. In fact, most of the pirate movies of the 1940s and 1950s were replete with humorous, ironic and witty actions, interactions, characters, and dialogue—e.g., *The Crimson Pirate* (1952), *The Pirate* (1948), *The Black Swan* (1942), *Raiders of the Seven Seas* (1953), and *The Princess and the Pirate* (1944). Humor and comedy were a main selling point of the pirate adventure. Even the Disneyland Ride—which Plaintiffs explicitly borrowed from in their Screenplay—played up this “humorous tone” with scenes of women chasing pirates, drunk pirates laying with the pigs, imprisoned pirates trying to lure a dog with a skeleton’s bone, and the like.

For example, *Yellowbeard* (1983)—a film cited by Plaintiffs in their original complaint as being a centerpiece work in the genre—was a fast-paced, action-adventure comedy that self-promoted as “the comedy of the century—the seventeenth century” and included humorous dialogue (e.g., Dan, Yellowbeard’s son: “I can’t kill him, he brought me up, just like a father.” Yellowbeard: “Oh—you mean he beat you and kicked you and smashed you in the teeth?” Dan: “No, he’s been kind and gentle.” Yellowbeard: “What kind of father is that?! Kill him!”) and wit (e.g., Yellowbeard: “What, you again?” Yellowbeard’s wife: “Again?! I haven’t seen you for fifteen years!” Yellowbeard, exasperated: “What is it this time?”).

Similarly, *The Goonies* (1985), to which Plaintiffs compared their Screenplay, was a comedy adventure film that fully captured a humorous tone, “diluting the impeding sense of danger.” (Román Expert Report, p. 6.)

In *Under the Black Flag: The Romance and the Reality of Life Among the Pirates* (1995), David Cordingly explains that along with Blackbeard, Captain Hook, and Byron’s Corsair, Long John Silver’s tall, powerful, wily character, “which alternates between jovial good humor and utter ruthlessness in the pursuit of gold,” has come to represent many people’s image of a pirate.

## B. Characters

Dr. Román opines that various character types are unique to Plaintiffs’ Screenplay, when in fact each character is a generic archetype common throughout the pirate genre.

**Pirate with a drinking problem.** Dr. Román argues that Plaintiffs’ inclusion of a disillusioned pirate with a drinking problem is a unique element. A drunken pirate is a common genre trope, and part of the Disneyland Ride. Even handsome roguish, heroic protagonists in pirate movies drink a lot—e.g., *The Black Swan* (1942). *Captain Blood* (1922 novel; 1935 film), cited by Plaintiffs’ as being central to the genre, similarly features Dr. Peter Blood, the lead pirate, who is also admittedly a disillusioned drunk (e.g., at one point he says, “Such a partnership requires sober thought. My poor head has been dancing with rum this whole week past.”). A critical plot arc of *Captain Blood* is the pirate captain’s descent into despair and drink, and his ultimate rehabilitation for the sake of a woman he hopes to impress and win. *The Sea Hawk* (1940) featured rum-soaked pirates in an attempt to save England. And *Treasure Island* (1883), similarly cited by Plaintiffs as being central to the genre, introduced “Dead Man’s Chest,” a famous and fictional sea song flattering the drunk pirate life, featuring the iconic line “drink and the devil had done for the rest—yo-ho-ho, and a bottle of rum!”

***Cunning but likeable second lead character.*** Similarly, Plaintiffs' claim to a second male lead who is cunning and sinister but also charismatic and likeable is not a novel concept. Indeed, many pirate tales focus on a lead pirate with a right hand man or sidekick fitting this exact description. For example, in *Cutthroat Island* (1995), Morgan Adams, the lead captain of her father's, is accompanied by William Shaw, a crafty and charming secondary lead—his introductory scene portrays the doctor-turned-thief working an elegant dancing ball, charming and stealing from the female guests. Similarly in *Savage Islands* (1983; also known as *Nate and Hayes*), another work cited by Plaintiffs in their original complaint as a centerpiece for the pirate genre, lead character Nate Williamson teams up with an unsuspecting ally, the roguish yet charming William Hayes (e.g., Hayes: "You sound like a very sad and bitter old lady, Ben."). As to Dr. Román's claim that this type of character uniquely made Plaintiffs' Screenplay "highly engaging and entertaining" and "more friendly to a mass audience," most of the pirate movies of the 1940s and 1950s were about being lighthearted, engaging, and entertaining—e.g. *The Black Swan* (1942), *The Princess and the Pirate* (1944), *Raiders of the Seven Seas* (1953), and *The Crimson Pirate* (1952).

***"Swashbuckling" pirates.*** Although Dr. Román thinks that "combining elements of the swashbuckler and the pirate appears to be an original innovation specific to [Plaintiffs'] Screenplay," it is anything but. As an initial matter, the distinction between swashbuckler and pirate is artificial at best. "Swashbuckling pirates" has itself been a trite expression and common in much of pirate lore. For instance, in the trailer for *Captain Blood* (1935), cited by Plaintiffs as being central to the genre, the lead pirate, Peter Blood, is described as a "swashbuckling leader." Even a cursory search on Google Books for the phrase "swashbuckling pirate" confirms that this concept has been commonplace for decades if not centuries. For instance, the search turns up *The Real Story of the Pirate* (1923) ("But once again Mary proved only a woman with a romantic soul and a tender heart, though she was a swashbuckling pirate with pistols and cutlass in her belt and murder on her soul."). It turns up *Pirates and Seafaring Swashbucklers on the Hollywood Screen: Plots, Critiques, Casts and Credits for 137 Theatrical and Made-for-Television Releases* (1995). And it turns up *Postcolonial Piracy* (2014), which states that the "[t]he swashbuckling pirate-figure has a pop-cultural history" dating to *A General History of Pyrates* (1724)—one of the works cited in Plaintiffs' original complaint. Similarly, searching for "pirate swashbuckler" in Google Books turns up instances such as *Burt Lancaster: Hollywood's Magic People* (1971) (describing *The Crimson Pirate* (1952) as "the pirate swashbuckler to end all swashbucklers").

Further, swashbuckling "with flamboyance and swagger" and pirates being swashbucklers have been common in pirate movies since Douglas Fairbanks Sr. in *The Black Pirate* (1926). Flamboyance and swagger are, literally, included in the definition of swashbuckling. The dictionary definition of swashbuckler is "a skilled swordsman, soldier, adventurer, or daredevil." The idea of the hero and villain being skilled swordsmen is ubiquitous in pirate movies—think of *Peter Pan*—and various other adventure movies.

As explained above, while real, live, historical pirates were not "good men" but common criminals, often savage murderers and brutal robbers, fictional pirates in books, plays, and films have often been portrayed as heroes—swashbuckling "good men" who defeat the corrupt villain and win the heroine's heart.

Men of upright stature turned pirates is likewise a genre trope. For example, *Captain Blood* (1922 novel; 1935 film), a work cited by Plaintiffs as central to the genre, tells the story of Peter Blood, an honorable physician and former soldier and sailor who is driven to piracy after being unjustly deemed a part of the Monmouth rebellion. In *Treasure Island* (1883), also cited by Plaintiffs as being a centerpiece in the genre, the lead character is an innkeeper's son turned pirate. *Captain Singleton* (1720), yet another work cited by Plaintiffs as central to the genre, features the lead character as a child from a well-to-do family who was kidnapped and eventually turned to a life as a pirate. Somewhat similarly, in *The Buccaneer* (1938), yet another work Plaintiffs agree is central to the genre, the lead pirate Laffite demonstrates a sense of loyalty and decorum towards the Louisiana government. The Pirate King of *The Pirates of Penzance* (1879 opera; 1981 Broadway production) is similarly held out as highly noble.

**Lead women.** The “lively adventurous young women who dream of a life beyond the constraints of the port town where they’ve been raised” is similarly not novel. For instance, in *Blackbeard the Pirate* (1952), a film Plaintiffs cited as being at the center of the pirate genre in their original complaint, a privateer turned pirate falls in love with a pirate’s daughter onboard who set sail with her father. Even the notion that these young women “engage the pirates on nearly equal terms in matters of skill, wit, and athletics” is not novel. *Cutthroat Island* (1995), which Plaintiffs’ own artwork indicates as a key source of their Screenplay’s material, tells the story of female pirate Morgan Adams on a quest for treasure. Similarly, Captain Rouge in *The Golden Hawk* (1952), Captain Anne Providence in *Anne of the Indies* (1951), and Prudence ‘Spitfire’ Stevens in *Against All Flags* (1952) are female pirate leads who hold their own against their male counterparts. Further, notorious, real-life female pirates have inspired pirate lore: real-life female pirate Mary Read inspired *Queen of the Seas* (1961) and Grace O’Malley inspired *Grania: She-King of the Irish Seas* (1986). Certainly the portrayal of strong female leads in pirate lore is not an invention of Plaintiffs’ Screenplay.

Pirates and privateers wooing the daughter of a local official or gentry is also an extremely common genre trope. For instance, it provides the central narrative impetus of *Captain Blood* (1922 novel; 1935 film), where the eponymous pirate Peter Blood tries to prove himself worthy of the governor’s niece, Arabella. He goes so far as to kill his villainous partner, Levasseur, in a duel to save her from him. Indeed, one of the short stories that Rafael Sabatini ultimately wove into *Captain Blood* was simply titled “The Governor’s Daughter.” The trope was so well established that winning the hand of a governor’s daughter is a victory condition in a popular series of computer games entitled *Sid Meier’s Pirates!*, first released in 1987.

### C. Theme, Plot, and Sequence of Events

The theme, plot, and sequence of events of Plaintiffs’ Screenplay are also not inventive.

**Skeleton crews.** “Pirate ships with skeleton crews,” cursed pirates, lost or stolen treasure, etc. are all stock elements in film and literature. For instance, *The Flying Dutchman* is an ancient myth, dating back to the 17th century, of a ghost ship that was said to be cursed to sail the oceans forever; *The Flying Dutchman* was also popularized by films like *Pandora and the Flying Dutchman* (1951), poems like *The Rime of the Ancient Mariner* (1797), and novels like *The Phantom Ship* (1839). The acclaimed comic miniseries *Watchmen* (1986-1987) features as a story-within-story “Tales of the Black Freighter,” which depicts a phantom pirate ship crewed by

the damned undead. Similarly, *On Stranger Tides* (1987)—nominated for the World Fantasy Award for Best Novel—features a pirate ghost ship, undead pirate crews, attempts to undo curses, and quests that take the characters to various islands. The *Monkey Island* video game series (1990-2009), is set on fictional Caribbean islands around the 17th century featuring a main character pirate, Guybrush Threepwood, who woos the adventurous female Governor Marley while facing off against the villainous zombie-ghost pirate LeChuck and his skeletal crew. Skeletal crews and the ghost ship are also featured in the Disneyland Ride—indeed, Plaintiffs' sizzle reel incorporated that footage from the Ride. Numerous films, such as *The Ghost Pirates* (1909), *James and the Giant Peach* (1996), *Dead Men Tell* (1941), *Ghost in the Noonday Sun* (1973), *Matusalem* (1993), and *Peter Pan and the Pirates: Ghost Ship* (1992), all also feature pirates with skeleton crews, cursed pirates, and lost or stolen treasure. The children's television show *Scooby Doo* has also featured multiple episodes with ghost pirates.

**Dressing up as women.** Plaintiffs' complaint argues that dressing up like women is a unique, similar element in the works. But it is not at all unique. Men dressing up as women is common in many comedic movies—including pirate movies. For instance, *The Crimson Pirate* (1952) featured the hero pirate, Captain Vallo, and two others dressed up as women to deceive the villainous governor and his soldiers. In *A High Wind in Jamaica* (1929 novel, 1965 film), pirates, some disguised as women, capture a ship and take the children aboard prisoner; the children wind up serving aboard the ship. In the 1925 Basil Lubbock painting “Pirates Decoying an American Ship,” the pirates are disguised as women. Thus, employing the commonplace comedic trope of a male character disguising himself as a woman is neither unique in film nor even unique in the pirate genre.

**Romance.** Dr. Román posits that “the element of romance [was] … one of [Plaintiffs’ Screenplay’s] major innovations to the typical pirate story.” This statement is wholly inaccurate. In most, if not all, the pirate movies of the 1920s, 1930s, 1940s, and 1950s, a romance between the protagonist pirate and the female lead was “central” to the story, including many of the films cited by Plaintiffs in their original complaint as central to the pirate genre: *Captain Blood* (1935), *The Buccaneer* (1938), *The Pirate* (1948), *Blackbeard the Pirate* (1952), and *Peter Pan* (1953). Redemption through romance, the moral that there is more to life than greed, and community support for the romantic relationship are also all commonplace in the pirate genre. For example, in *Yellowbeard* (1983), a film Plaintiffs cited as being at the center of the pirate genre in their original complaint, Yellowbeard not only reunites with his estranged son and finds redemption, but his son also finds love in the daughter of one of the film’s villains; the entire crew is supportive of the new unions. In *Captain Blood* (1922 novel; 1935 film), romance is a centerpiece of the story, and Blood’s romantic pursuit of the governor’s niece, Arabella, both leads him away from piracy and redeems his pirate crew. *The Pirate* (1948), another work Plaintiffs cited as being at the center of the pirate genre in their original complaint, similarly features a redemption story through love, the moral that there is more to pirate life than greed, and an ultimate romantic union that is supported by the community.

Romance in pirate genre is also explained historically. In *Under the Black Flag: The Romance and the Reality of Life Among the Pirates* (1995), David Cordingly calls the Golden Age of Piracy the beginning of the change in public perception about pirates. By the early 1700s, the threat of piracy and attacks on merchant shipping in the Caribbean and along the American seaboard was receding due to stepped-up naval patrols. Historical facts were blended

with fiction, and the common murderers and robbers that pirates were (and are) in reality began to take on the status of romantic outlaws in ballads, plays, poems, and novels.

For example, in 1713, *The Successful Pyrate* play was based loosely on the real life of Captain Henry Avery and portrayed him as a brave outlaw. The play also features a love story between an Indian princess and a young man. It became the first in a long line of melodramas with pirate themes that entertained London theatergoers over the next 150 years, with most featuring love stories. Similarly, in 1720, novelist Daniel Defoe published *Captain Singleton*, a work cited by Plaintiffs as being central to the genre, which is a fictional pirate's autobiography where the pirate finds love. The romantic pirate outlaw and his exotic adventures also gained popularity from *The Corsair*, an 1813 epic poem by Lord Byron, and Walter Scott's 1822 novel, *The Pirate*; both are about tragic figures attractive to women and admired by their crews.

**Orphans.** Orphaned characters in pirate stories are also not novel. In *Captain Blood* (1922 novel; 1935 film), a work cited by Plaintiffs as being central to the genre, the main character, Peter Blood, lost his mother in childhood and his father at age 20. *The Coral Island* (1857), another work Plaintiffs cited as being at the center of the pirate genre, tells the story of three boys marooned on an island who become a family of their own and seek mentorship in the pirate crew who shows up on the island. *Captain Singleton* (1720), another work Plaintiffs cited as being at the center of the pirate genre, tells the story of Daniel Defoe, a child from a well-to-do family who was stolen, raised by gypsies, and eventually becomes a pirate. Maybe the ultimate orphan story in the pirate genre, *Peter Pan* (1904 play; 1911 novel; 1953 Walt Disney Productions film), not only centers on an orphaned boy with no parents looking to make a family but also includes the Lost Boys, a group of orphans whom Peter raises on the island, forming bonds among themselves, and ultimately finding a sense of family. *Pirates of Penzance* (1879 opera; 1981 Broadway production), similarly tells the story of a pirate crew composed of orphans who bond among themselves, forming an orphan pirate family, and even spare any lives along the way if they too are orphans; the main character Frederic even invites them to give up piracy and go with him but later Frederic joins the pirates aboard their ship as one of the crew.

**Prologue.** Prologues are common in movies and literature, and Dr. Román even acknowledges this is a common plot device in literature and drama. As to there being “no precedent in the genre of the pirate story to encourage such a prologue,” that is plainly untrue. Prologues are commonplace in the pirate genre, and regularly introduce the major characters and include a conflict that throws the audience into the pirate story. For instance, in *Yellowbeard* (1983), a film Plaintiffs cited as being at the center of the pirate genre in their original complaint, the film starts with a prologue set in the 1600s on a ship 20 years before the main plot and features an act of betrayal and stolen treasure. *Captain Blood* (1935), another work cited by Plaintiffs as being central to the genre, similarly features a prologue set in the 1600s where the main character is convicted of being a traitor and exiled to the British Colonies of the Caribbean. *Raiders of the Seven Seas* (1953) also has a prologue set in the 16th century in which the heroic pirate Barbarossa escapes a Spanish prison in Morocco and steals a Spanish galleon before jumping ahead in time to action in the Caribbean. *The Princess and the Pirate* (1944) also has a prologue featuring the Pirate Captain burying his treasure on an island then killing the map maker and men who buried the treasure. Even the Disneyland Ride arguably has a prologue, introducing riders to the port town and time period before riders are swept away into the action.

**Climatic ending.** Dr. Román again suggests a romantic ending is unique in the pirate genre, but, as explained above, this is not the case. The other element Dr. Román suggests is novel is a final battle in a cave. Caves are common place in the pirate genre and a centerpiece of the Disneyland Ride *Pirates of the Caribbean*. As Plaintiffs advertised in their cover letter, their Screenplay was in fact based on the Disneyland Ride. Just like in the Ride, in Plaintiffs' Screenplay the cave is accessed by riding a boat over a waterfall. Further, Plaintiffs' Screenplay even explains that the "boat continues sailing through the cavern like the DISNEYLAND RIDE, 'PIRATES OF THE CARIBBEAN'" and that the cave is decorated with skeletons of pirates impaled by swords and treasure off to the side of the boat, like in the Ride. (Plaintiffs' Screenplay, p. 98.) The Disneyland Ride also ends with an epic shootout in a cave. A cave is also the resting place of the treasure in *Treasure Island* (1883 novel; 1950 Walt Disney Productions film), a work Plaintiffs claimed in their original complaint was central to the pirate genre. Skull Rock in *Peter Pan* (1904 play; 1911 novel; 1953 Walt Disney Productions film) is also a cave. And in *The Goonies* (1985), which Plaintiffs admitted in their cover letter inspired their Screenplay, the final showdown also happens in a cave. *Cutthroat Island* (1995) likewise features climactic battle scenes in a treasure-filled cave on the titular Cutthroat Island.

#### **D. Pace, Setting, and Dialogue**

**Pace.** Dr. Román suggests that the fact that both works share a fast-paced and adventurous nature is notable. Far from being notable, however, nearly all works in the pirate genre, and particularly nearly all films in the pirate genre, share an adventurous and fast-paced momentum.

**Setting.** Dr. Román also emphasizes that both works take palce in the Caribbean seas, on boats, and in an island cave. Again, nearly all pirate works occur in part on the high seas, on boats, and on islands. This is also the exact setting of the Disneyland Ride and it is not surprising that it would be used in the Disney Film. The Caribbean as a setting for a pirate story is not only literally in the name of the Disneyland Ride, it is far and away the most common setting for the genre, and is the setting of numerous works cited by Plaintiffs as central to the genre, e.g., *A General History of the Pyrates* (1724), *The Pirate* (1948), *The Red Rover* (1827), *Captain Blood* (1922 novel; 1935 film).

**Dialogue.** Finally, Dr. Román argues that the dialogue is echoed between the works—albeit without highlighting any examples himself. The examples identified in the First Amended Complaint, however, are of little note, and only highlight: (1) comments about a ghost ship, which as explained above is not novel and featured in the Disneyland Ride; (2) pirates being ruthless, which is similarly an extremely common trope in the genre and featured in the Ride; (3) references to cursed pirates, which is also explained above as not being novel and again featured in the Ride; and (4) comedic scenes with women, which is again not only featured in the Disneyland Ride by women chasing pirates or the scene of a woman telling her husband being held over a well "don't be chicken" but also common place in the pirate genre generally. Certain lines, such as the "yo ho, yo ho, a pirate's life for me" song, are common in the works because they are iconic elements of the Disneyland Ride that Plaintiffs admit they appropriated into their Screenplay.

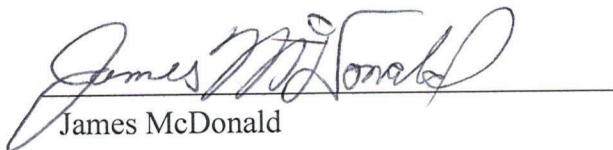
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## CONCLUSION

Based on my knowledge and experience with respect to the creation and development of stories into motion pictures, and the foregoing filtration analysis, I conclude that there is no substantial similarity of protectable expression between Plaintiffs’ Screenplay and the Disney *Pirates of the Caribbean* Film. The similarities that do exist between the two works exist at such a high level of abstraction as to constitute similarities between abstract ideas rather than similarities of actual, concrete expression.

Respectfully submitted,

Dated March 30, 2021



James McDonald

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## **CAREER HISTORY**

### **1990 to Present**

#### **PRODUCER**

Feature/TV Films

- Development deals with Walt Disney Pictures, Polygram Entertainment, Propaganda Films, and Image Organization.
- Partnerships with The Avnet/Kerner Co., Allagash Films, and Partisan U.S.A.

Music

- Managing Partner of the My Songs Company (1993-Present).

#### **STORY CONSULTANT, EXPERT WITNESS and ANALYST**

Walt Disney Corporation

- Disney and Pixar Animation Business Affairs Depts.: Forensic analyst for writer credit determinations (1992-Present).
- Feature Film Dept.: Development consultant and Story Analyst (1990-2008).
- Litigation Dept.: Story consultant/expert witness on several copyright cases (1997-Present).

Barnes & Thornburg Law Firm

- Litigation Dept.: Expert Witness on one credit arbitration case (2016)

Munger, Tolles & Olsen Law Firm

- Litigation Dept.: Expert witness on two copyright cases (2015 & 2021).

Akin Gump Law Firm

- Litigation Dept.: Expert witness on one credit arbitration case (2010).

Butzel Long Law Firm

- Litigation Dept.: Expert witness on one copyright case (2007).

Paul, Hastings, Jovanovich Law Firm

- Litigation Dept.: Expert witness on two copyright cases (1997 & 1999).

Warner Bros., HBO, 20<sup>th</sup> Century Fox, MGM, Miramax, Lionsgate and Walden Media Inc.

- Story consultant and/or analyst for writer credit determinations & issues.

### **1977 to 1990**

#### **DEVELOPMENT EXECUTIVE**

Freddie Fields Productions – V.P., Production. Handled development of the movie GLORY.

20<sup>th</sup> Century Fox – Director of Acquisitions & Story Editor/Analyst for John Davis (studio owner at the time).

#### **STORY ANALYST**

20<sup>th</sup> Century Fox, Paramount, Orion, Lorimar, Columbia, Universal, Disney and MGM.

#### **EDUCATION**

U.C.L.A. – M.F.A. in Directing, Film & Television Dept.  
Stanford University – B.A., Communications